STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
ADEYINKA O. ADEWUNMI,	)	
	)	
	)	
Complainant,	)	CHARGE NO(S): 2006CF1632
	)	EEOC NO(S): N/A
and	)	ALS NO(S): 07-644
	)	
TANDEM STAFFING SOLUTIONS, INC.,	)	
	)	
	)	
Respondent.	)	

NOTICE

You are hereby notified that the Illinois Human Rights Commission has not received timely exceptions to the Recommended Order and Decision in the above named case. Accordingly, pursuant to Section 8A-103(A) and/or 8B-103(A) of the Illinois Human Rights Act and Section 5300.910 of the Commission's Procedural Rules, that Recommended Order and Decision has now become the Order and Decision of the Commission.

STATE OF ILLINOIS)
HUMAN RIGHTS COMMISSION) Entered this 7th day of January 2011

N. KEITH CHAMBERS
EXECUTIVE DIRECTOR

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

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ADEYINKA O. ADEWUNMI,	)	
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Complainant,	)	
	)	**Charge No.: 2006CF1632**
	)	**EEOC No.: N/A**
	)	**ALS No.: 07-644**
TANDEM STAFFING SOLUTIONS, INC.,	)	
	)	**Judge William J. Borah**
Respondent.	)	

RECOMMENDED ORDER AND DECISION

This matter comes to be heard on Respondent's Motion for Summary Decision. Complainant has filed a written response to the motion, and Respondent has filed a written reply to that response. In addition, both parties submitted various documents, including affidavits, in support of their positions. The matter is ready for decision.

The complaint in this matter alleges that Respondent illegally discriminated against Complainant on the bases of his race, Black, and his national origin, Nigeria. Respondent's motion seeks summary decision on both of those claims.

FINDINGS OF FACT

The following facts were derived from uncontested sections of the pleadings or from uncontested sections of the affidavits and other documentation submitted by the parties. The findings did not require, and were not the result of, credibility determinations. All evidence was viewed in the light most favorable to Complainant.

1. Respondent, Tandem Staffing Solutions, Inc., operated a temporary employment placement agency.

2. In 2005, Respondent had several branches situated in Chicago and the surrounding area. One branch was located on the premises of its client, AGI/Klearfold ("AGI").

3. In the AGI branch, Cindy Sanchez ("Sanchez"), was the On-Site Supervisor and, Gloria Gallegos ("Gallegos"), was the On-Site Manager.

4. Respondent had a non-discrimination policy as part of its Employee Handbook, which was given to all new employees, including Complainant.

5. Sanchez was responsible for hiring Respondent's employees and introducing them to its policies.

6. Sanchez was also responsible for logging telephone calls from its employees as per Respondent's call-in work procedure, and coordinating them with the daily work assignments.

7. It was required, by "protocol," that any employee who intended to work on any given day, contact Respondent's office by telephone prior to being placed on that day's work assignment list.

8. In addition, Sanchez received the daily work orders from AGI. She matched their orders with the employees who called in to the office that morning.

9. On July 20, 2005, Complainant filled out Respondent's application form, was interviewed by Sanchez, and was hired as a new employee, all on the same day. Sanchez conducted a short orientation lesson with Complainant about the policies of Respondent, which included the mandatory call-in procedure. Sanchez disclaimed any knowledge of work consistency from one day to the next day. After Complainant was hired by Respondent, he was also eligible to call-in for available work at any of Respondent's other branches.

10. Complainant Adeyinka O. Adewunmi's race is Black and national origin, Nigeria.

11. Respondent's job placement list was prioritized based on the following factors: 1) those employees who called in, and 2) those who had experience with AGI or who were trained in certain jobs. AGI could participate in employee selection or rejection.

12. Complainant had no previous experience with AGI or Respondent.

13. Complainant was assigned tasks with AGI from July 25, 2005, through July 28, 2005. Complainant conformed to Respondent's call-in procedures, except for one day. On that day, Complainant wrote a note to Sanchez that read, "See you tomorrow." The next day and without

invitation from Sanchez, Complainant appeared at the office for his work assignment. Because AGI needed employees, Complainant was assigned as task.

14. Sanchez reminded Complainant of Respondent's call-in procedure. In response, Complainant proposed that he be permitted to leave a note of his intent to work the night before each shift instead of calling in. Sanchez rejected Complainant's suggestion and insisted on Respondent's phone in procedure. Complainant objected, giving the cost of the use of his phone as his reason. Sanchez offered to loan him $10.00.

15. On July 29, 2005, Complainant failed to follow Respondent's call-in procedure, and instead, arrived in person at the office for a work assignment. Complainant was not permitted to sign in and he was not assigned a task by the Manager, Gallegos.

16. Starting on July 29, 2005 and throughout August 2005, AGI's work orders began to decline. The number of AGI work orders dropped off even more significantly in September and October 2005. As a result, Complainant's employment opportunities were negatively affected.

17. Sanchez communicated to Complainant about the downturn in work orders, but "instructed" Complainant to keep calling in each day.

18. Complainant's contact with Respondent slowed and then stopped.

CONCLUSIONS OF LAW

1. Complainant is an "aggrieved party" as defined by Section 1-1-3(B) of the Illinois Human Rights Act, 775 ILCS 5/1-101 et seq. ("Act").

2. Respondent is an "employer" as defined by Section 2-101(B)(1)(a) of the Act and is subject to the provisions of the Act.

3. Complainant cannot establish a *prima facie* case of discrimination against him on the basis of his national origin, Nigeria, and/or his race, Black.

4. Respondent can articulate a legitimate, non-discriminatory reason for its actions.

5. There is no genuine issue of material fact on the issue of pretext, and Respondent is entitled to a recommended order in its favor as a matter of law.

6. A summary decision in Respondent's favor is appropriate in this case.

DISCUSSION

SUMMARY DECISION STANDARD

Under section 8-106.1 of the Act, either party to a complaint may move for summary decision. A summary decision is analogous to a summary judgment in the Circuit Courts. Cano v. Village of Dolton, 250 Ill.App.3d 130, 138, 620 N.E.2d 1200, 1206 (1st Dist.1993).

A motion for summary decision should be granted when there is no genuine issue of material fact and the moving party is entitled to a recommended order in its favor as a matter of law. Fitzpatrick v. Human Rights Comm'n, 267 Ill.App.3d 386, 391, 642 N.E.2d 486, 490 (4th Dist.1994). All pleadings, affidavits, interrogatories, and admissions must be strictly construed against the movant and liberally construed in favor of the non-moving party. Kolakowski v. Voris, 76 Ill.App.3d 453, 456-57, 395 N.E.2d 6, 9 (1st Dist.1979). Although not required to prove his case as if at a hearing, the non-moving party must provide *some* factual basis for denying the motion. Birck v. City of Quincy, 241 Ill.App.3d 119, 121, 608 N.E.2d 920, 922 (4th Dist.1993). Only facts supported by evidence, and not mere conclusions of law, should be considered. Chevrie v. Gruesen, 208 Ill.App.3d 881, 883-84, 567 N.E.2d 629, 630-31 (2d Dist. 1991). If a respondent supplies sworn facts that, if uncontroverted, warrant judgment in its favor as a matter of law, then a complainant may not rest on his pleadings to create a genuine issue of material fact. Fitzpatrick, 267 Ill.App.3d at 392, 642 N.E.2d at 490. Where the movant's affidavits stand uncontroverted, the facts contained therein must be accepted as true and, therefore, a complainant's failure to file counter-affidavits in response is frequently fatal to his case. Rotzoll v. Overhead Door Corp., 289 Ill.App.3d 410, 418, 681 N.E.2d 156, 161 (4th Dist. 1997). Inasmuch as summary decision is a drastic means for resolving litigation, the movant's right to a summary decision must be clear and free from doubt. Purtill v. Hess, 111 Ill.2d 229, 240 (1986).

Complainant as a *Pro Se* Litigant

Pro Se Complainant, Adeyinka O. Adewunmi, guided his case through the Department and the Commission, authoring pleadings and submitting written responses. There is some sympathy with the *pro se* litigant, as the practice of law requires skills that sometimes test the abilities of licensed attorneys. However, "Justice requires that the parties live with litigation decisions they have made, either through their attorney or on a *pro se* basis." Fitzgerald and Fischer Imaging Corp., IHRC, ALS No.10142, May 29, 1998.

The fact that Complainant is a *pro se* litigant has no influence on this decision, as "...a *pro se* litigant is held to the standard of an attorney." Mininni and Inter-Track Partners, IHRC, ALS No.7961, December 10,1996, quoting First Illinois Bank and Trust v. Galuska, 155 Ill.App.3d 86, 627 N.E.2d 325 (1st Dist.1993). The Illinois Appellate Court advises, "Our task is not to divine the truth from the interstices of the parties' filings or to sift through the record like a tealeaf reader conjuring up fortunes in order to gain a proper understanding of the case before us." Id. Complainant's written Response is held to the mandatory standards cited above.

Complainant's Response

Respondent argued that Complainant failed to submit any counter-affidavits in his response, and as a result, the affidavit of Ms. Sanchez should be taken as uncontroverted fact. However, Complainant's signed response will be considered as admissions. Kolakowski, supra.

Complainant's Motion for Summary Decision

On May 15, 2009, Complainant filed A Memorandum for a Summary Decision. As per the January 27, 2009, Order, all motions for summary decision were due by March 27, 2009. Therefore, Complainant's motion for summary decision is stricken as untimely. However, it was read and used as Complainant's supplemental response.

Racial Discrimination Standard

To establish a *prima facie* case of racial discrimination, Complainant must prove: 1) he is in a protected class; 2) he was meeting Respondent's legitimate performance expectations; 3)

Respondent took an adverse action against him; and 4) similarly situated employees outside Complainant's protected class were treated more favorably. Interstate Material Corp. v. Human Rights Comm'n, 274 Ill.App.3d 1014, 1022, 654 N.E.2d 713, 718 (1st Dist.1995).

National Origin Discrimination Standard

Complainant can prove a *prima facie* claim of national origin discrimination under the Act by showing that: 1) he is a member of a class protected by the Act; 2) that he was performing satisfactorily in his job; 3) he suffered an adverse employment action; and 4) similarly situated workers outside the protected class did not suffer the same adverse action. Freeman United Coal Mining Company v. Illinois Human Rights Commission, 173 Ill.App.3d 965, 527 N.E.2d 1289 (5th Dist.1988).

Where, however, the legitimate, non-discriminatory reason for the employment action has been made clear, it is no longer necessary to determine whether a *prima facie* case has been made. Since the only purpose of this type of *prima facie* case is to determine whether Respondent has to articulate a legitimate reason for its action, it becomes perfunctory to analyze the matter in terms of a *prima facie* case if the legitimate, non-discriminatory reason for the action has already been articulated. Bush and The Wackenhut Corporation, IHRC, ALS No. 1673, July 30, 1987, quoting U.S. Postal Service v. Aikens, 460 U.S. 711, 103 S.Ct. 1478 (1983).

By definition, proof of a *prima facie* case raises an inference that there was discrimination. By articulating a reason for the employment action in issue, Respondent destroys the inference. At that point, the question becomes whether the reason which was articulated by Respondent was true or merely a pretext for discrimination. Id.

There are two methods by which complainant may prove pretext: directly, by establishing that a discriminatory reason more likely motivated Respondent, or indirectly, by

showing that Respondent's proffered reason is unworthy of credence. Roger and Commonwealth Edison Company, IHRC, ALS No. 7512R, March 17, 1998.

In St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993), the Supreme Court ruled that even when a plaintiff proves an employer's reason for the challenged action to be false, he or she will not automatically prevail.

The question is not whether the employer in this case made a "perfect decision," but rather whether the decision was one based on race discrimination. Bush, supra, at 169. A business decision may be considered "legitimate" and "non-discriminatory" within the meaning of McDonnell Douglas, supra, "even though the decision is not the most equitable one which could be made." Phillips, et al and Walsh Construction Company of Illinois, IHRC, ALS No. 1729. June 28,1988. The Complainant must present some evidence that the employer's explanation has been found to be "unworthy of credence." Id. The accuracy of the employer's decision is secondary as long as there is a good faith belief in it. Holmes v. Board of County Commissioners, Morgan County IHRC, ALS No.1463(K), August 4,1986..

The facts in this case are not particularly complicated. Respondent, Tandem Staffing Solutions, Inc., operated a temporary placement agency. In 2005, Respondent had several branches in Chicago and the city's surrounding area. One branch was located on the premises of its client AGI/Klearfold ("AGI"). There, Cindy Sanchez was the On-Site Supervisor and Gloria Gallegos was the On-Site Manager. Respondent had a non-discrimination policy as part of its Employee Handbook, which was given to all new employees, including Complainant.

Sanchez was responsible for hiring Respondent's employees and introducing them to its policies. She was also responsible for coordinating the telephone calls of its employees as per its call-in work procedure, described by Respondent as a "protocol," and drafting the daily work assignment list from the morning's call-in record. It was required that any employee who intended to work on any given day contact Respondent's office, by telephone, prior to being

placed on that day's work assignment list. In addition, Ms. Sanchez received the daily work orders from AGI. She matched the AGI orders with those employees who called in to the office that morning.

On July 20, 2005, Complainant filed out Respondent's application form, was interviewed by Sanchez ,and was hired as a new employee, all on the same day. Sanchez conducted a short orientation lesson with Complainant about the policies of Respondent, which included the required call-in procedure. Sanchez told Complainant that Respondent had "lots of openings." However, she disclaimed any work consistency from one day to the next day. After Complainant was hired by Respondent, he was also eligible to call-in for available work at any of Respondent's other branches.

Respondent's job placement list was prioritized based on the following factors: 1) those that called in, and 2) those who had experience with AGI or who were trained in certain jobs. AGI could participate in employee selection or rejection. Complainant had no previous experience with AGI or Respondent.

Complainant was assigned tasks with AGI from July 25, 2005, through July 28, 2005, and except for one day, he conformed to Respondent's call in procedures.[1] On that day, Complainant wrote a note to Sanchez that read, "See you tomorrow." The next day and without invitation from Sanchez, Complainant appeared at the office for his work assignment. Because AGI required Respondent's employees that day, Complainant was assigned there despite his failure to comply with the call-in procedure.

However, Sanchez reminded Complainant of Respondent's call-in procedure. In response, Complainant proposed to Sanchez that he should be permitted to merely leave a note

[1] In the "Declaration" of Cindy Sanchez, #26, she mentioned that Complainant's initial work performance with AGI was not acceptable to AGI. However, after a change of tasks, Complainant's performance was not cited as a factor in Respondent's subsequent work list placement. In fact, Respondent described Complainant's over all work performance as "adequate."

of his intent the night before each shift instead of calling in. Sanchez rejected Complainant's suggestion and insisted on Respondent's call-in process. Complainant then objected, giving the cost of the use of his phone as his reason. Sanchez offered to loan him $10.00.

On July 29, 2005, Complainant failed to follow Respondent's call-in procedure, and instead arrived in person at the office for a work assignment. Complainant was not permitted to sign in and was not assigned a task by Manager Gallegos. [2]

By both graph and work order figures, as referenced in the affidavit of Sanchez and its Exhibits C and D, Sanchez explained that "starting in July 29, 2005 and throughout August 2005, AGI's work orders began to decline." The number of AGI work orders "dropped off even more significantly in September and October 2005." As a result, Complainant's employment opportunities were affected.

Sanchez communicated to Complainant about the downturn in work orders from AGI, but "instructed" Complainant to keep calling in each day. The prioritizing factors discussed above were used in assigning employees work assignments. Because Complainant had little seniority with Respondent and AGI, four days, he "would be the least likely employee placed as the AGI work orders began to decrease."

Complainant's contact with Respondent slowed. Complainant "called in two or three days after July 29, 2005." Respondent contended that Complainant ceased calling in after the first week in August, "and no one at Tandem (Respondent) heard from Adewunmi (Complainant) again."

Complainant's allegations run slightly askew of Respondent's understanding of the material facts. A discussion of collateral issues or ones of credibility and speculation will not be addressed here.

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[2] Except for not being placed on the day's worker list, Complainant was neither disciplined for not conforming to the daily call-in protocol of Respondent nor was his conduct used as a factor with Respondent's subsequent work list placement.

Complainant stated he was hired on a full time basis, but his actions do not conform to that conclusion. In part, Complainant pointed to Respondent's handbook to deny Respondent's call-in work procedure and bolster his full time employment status allegation. The handbook states "Always report at the agreed time. Call us in advance if for any reason you will not be at work." However, both Complainant's and Respondent's behavior showed a call-in procedure existed during the time of his employment and he was not a full time employee.

Although Complainant objected to Respondent's call-in procedure in his response, by doing so, he indirectly acknowledged it and his status as a temporary employee. "This was the time I discussed it (Respondent's call-in procedure) with her (Sanchez), that she should spare me the expense of calling them for my availability everyday, where-by, I would not need (unreadable), but I will call, if for any reason I would not be able to work at any given day. I told her I would be leaving her a note every night that my shift ended. She accommodated that request wholeheartedly. Leaving a note to indicate my availability to work the next day was pre-arranged and approved by Cindy Sanchez. That was how I started leaving them a note, every night, before I left the work place for home every night." Sanchez denied she permitted any exception to Respondent's policy by Complainant.

In any respect, Complainant in his response represented that he telephoned the office after Sanchez reminded him of the call-in procedure and after he was sent home on July 29, 2005.

Respondent's call-in procedure is discussed here to show that it existed, was enforced, and finally complied with by Complainant. "When I started (sic) calling after been sent home by Gloria (Gallegos) on first of August 2005. I would always make sure that I called the place the moment the time was 10:00 am, with the hope of increasing my chances of been put to work that day."

Complainant differed with Respondent as to the number of times Complainant attempted to contact Respondent after July 29, 2010. Instead of just a few times during the first week in

August, " I (Complainant) continued to call in everyday for weeks, not just 2 or 3 days..." "It was Gallegos who continue to answer the phone every time I called..... I was expecting their corporate office to intercede on my behalf, so as to be reinstated." "It was the forth (sic) week of August that I finally had the opportunity to talk to Cindy Sanchez, not 2 or 3 days..." Gallegos allegedly told Complainant that "there are no jobs...quit calling."

"It was Gloria Gallegos that discharged me on the phone. She told me that my position had been eliminated, that I should stop calling AG for work any more. The last time I talked to Cindy was in September, this was when she told me that Gloria was her boss, and that was the reason why she could not override Gloria's decision."

Respondent described Complainant's overall work performance as "adequate," but because of the reduction in the number of "packers" ordered by AGI, Respondent could not continue to offer work assignments to Complainant.

Gallegos represented to Complainant that "she would not be able to place the newer Tandem employees like me who wanted to be assigned to work. Her action did not match her words, because she was the same person who was responsible for the hiring of workers. She continued hiring newer employees every week from the day that I was hired up till the last day of October 2005."

The Respondent told Complainant, "go and look for another job somewhere else with some of their agencies. ...Go to their own agency to go and look for jobs..." Dep. Comp. p.51

Although a judge with the Commission is not free to substitute his own judgment for the business judgment of an employer, Respondent cannot use such professed business judgment as a pretext for discrimination. Foster and the Galesburg Clinic Assoc., IHRC, ALS No. S-5484, June 11, 1993.

Respondent contended that ending temporary employment with Complainant or any temporary employee was not an adverse employment action. Respondent contended it never discharged Complainant, because "... it does not layoff or terminate employees as there is no

need to layoff or discharge employees as it is a temporary placement agency," and that Complainant's "employment file remains active should he call in to report his availability."

This argument has merit. If an employee unilaterally stopped calling in because of a personal reason, then the employee in effect withdrew himself from employment consideration with Respondent. This statement is also correct if the number of assignments was consistently less then the number of employees who called in, Respondent followed its employee prioritizing policy in assigning employees to their tasks, and the employee just gave up on not being assigned. However, if Respondent refused to place Complainant on its work list because of illegal discriminatory reasons, then Complainant suffered an adverse employment act. Complainant was not obligated to continue to call in everyday despite Respondent's call-in procedure if it was a "sham," and thus, a means to frustrate the victim of illegal discrimination into "cease working" and shield Respondent against claims under the Act. Lisa Legg and Illinois Dept. of Veteran's Affairs, ALS No. 6514, January 20, 1995.

Whether Complainant was a full time, part-time or temporary employee, an at-will or under contract, the Illinois Human Rights Act is still operable if the employee and employer meet its criteria.

Respondent submitted uncontroverted figures that from July 29, 2005, throughout October 2005, AGI's work orders significantly declined, and AGI was the exclusive client served by that branch of Respondent. Respondent had employee priority procedures in place that were based on seniority and AGI job. Complainant does not dispute the decrease in work orders or the priority system of Respondent.

Sanchez represented that "non-Black, non-Nigerian employees who called to be put on the job availability list after July 29, 2005,...who were similar to Complainant's week seniority and experience, were also told that there were not enough work orders and were not placed to work."

Complainant does not present any evidence that he was treated any differently than other employees with his seniority and experience with Respondent. Unfortunately, and almost to the detriment of Respondent's motion, it did not keep records of the employees who called in, were placed on a worker availability list drafted by Sanchez, but were not placed with AGI from July 29, 2005.

Complainant failed to present any evidence that Respondent's articulated reason for not assigning him work at AGI after July 29, 2005, was not because of a decreased number of work orders and the prioritization factors used to assign workers. Respondent had people other than Complainant who were qualified for these jobs, who had more seniority and who called in for work. Complainant fails to show that any similarly-situated employee outside of Complainant's protected class was treated any better than he was. Complainant had only a few days of seniority with AGI and Respondent.

Complainant pointed to Respondent's continued practice of accepting employment applications despite the decrease in work orders from AGI as a factor in his discrimination case. Respondent admitted to this practice as "it always needs to assure itself that it has enough competent employees to be placed."

Respondent explained the reason it will still hire new employees during a slow period of employee demand: 1) It does not have to pay temporary employees in waiting; 2) it keeps the supply up to date for an increase in demand. It does not have to lay off or terminate employees.

Complainant failed to show any factual evidence that a nexus existed between Respondent's hiring practice and illegal discrimination.

Complainant attempted to bridge Respondent's employment selection actions to show race and/or national origin animus with the following: "(He) (Complainant) was the only person at his orientation that was conducted in English, I was the only black person from Nigeria, and non Spanish speaking hired that day." Complainant failed to show any evidence of illegal

discriminatory act by pointing out the race or national origin of the group of employees at the orientation session.

Secondly, "Gloria Gallegos was waving in the work place. She was there greeting everybody in Spanish, saying 'como estas,' as if she knew each and everyone, and she could recognize them all." Complainant failed to show any evidence how Gallegos' waving and greeting of employees showed animus toward him because of his race and/or national origin.

Third, cited in the Department's Intake Form: "I got the job on the spot. But Gloria told me not to sign in to work probably because; I am not Latino or Hispanic." However, the portion, "...probably because; I am not Latino or Hispanic," is conjecture at best.

Accordingly, Complainant failed to present some factual basis that would create a triable issue on the question of whether Respondent's articulated reason for its decision not to assign Complainant to work was a pretext for race and or national origin discrimination.

RECOMMENDATION

Based upon the foregoing, there are no genuine issues of material fact and Respondent is entitled to a recommended order in its favor as a matter of law. Accordingly, it is recommended that the Complaint in this matter and the underlying charge be dismissed in their entirety, with prejudice.

HUMAN RIGHTS COMMISSION

BY:_____
WILLIAM J. BORAH
ADMINISTRATIVE LAW JUDGE
ADMISTRATIVE LAW SECTION

ENTERED: May 14, 2010